

MEMORANDUM

September 6, 2001

TO: Don Sloma
Executive Director
Washington State Board of Health

FROM: Melissa Burke-Cain
Senior Counsel
Office of the Attorney General

SUBJECT: **Food Worker Permit Fees**

Question Presented

You have asked for my opinion about the likelihood that the State Board of Health (the Board) can act on a request to raise food and beverage worker permit fees in excess of the fiscal growth factor as defined in RCW 43.135. Fee increases imposed by state agencies are subject to this limitation; fee increases imposed by local government are not. I have reviewed the Board's statutory authority to set food worker permit fees, the current administrative regulations governing such fees, and the Initiative Measure No. 601 fee increase restrictions, now codified as RCW 43.135.055, and pertinent legal authority.

Short Answer

The food worker permit fees are uniform across the state and set by the Board exercising discretion granted under RCW 69.06. By administrative regulation, the Board has set the fee at \$ 8.00. Also by regulation, the Board empowers local health jurisdictions to collect the fees, and retain the fees at the local level. The fees are used by each local health jurisdiction to offset the costs it incurs in food worker training and education, testing, and administration of the program. At present, the costs incurred by some local jurisdictions exceed the \$ 8.00 fee the Board has set under WAC 246-217-025. I conclude that on a more likely than not basis, the fee-increase limits are imposed by a state agency, the State Board of Health, and not local government. Thus, RCW 43.135.055 would apply to a fee increase for food worker permits set by the Board under RCW 69.06.020. The reasons for this conclusion are set forth below.

Discussion

The question can be broken down into 3 parts:

- 1). Is the food worker permit charge really a "fee" as that term is used in applicable state law?
- 2). If so, is the food worker permit fee imposed by local government and consequently exempt from the limits imposed by RCW 43.135.055?

3). If not, has the legislature subsequently approved a fee increase in excess of the fiscal growth factor under the terms of RCW 69.06?

1. The food worker permit charge is a "fee".

RCW 43.135.055 provides:

(1) No fee may increase in any fiscal year by a percentage in excess of the fiscal growth factor for that fiscal year without prior legislative approval. (2) This section does not apply to an assessment made by an agricultural commodity commission or board....(exemptions not relevant to the Board of Health)

The ultimate question is whether the food worker permit fee is a fee subject to RCW 43.135.055. If so, an increase in the food worker permit fee cannot exceed the fiscal growth factor. A preliminary question essential to the determination of the ultimate question is whether the food worker fee is really a "fee" within the meaning of RCW 43.135.

The term "fee" is not expressly defined in RCW 43.135. Under statutory construction principles, a term not statutorily defined is given its ordinary or common law meaning. *State v. Alvarez*, 128 Wash. 2d 1, 11, 904, P.2d 754 (1995). In determining the ordinary meaning of the term, courts often resort to a dictionary definition.

A fee is "a fixed charge for admission; a charge fixed by law or by an institution for certain privileges or services; a charge fixed by law for services of a public officer." Webster's Third International Dictionary. Black's Law Dictionary defines "fee" as "a charge fixed by law for services of public officers or for the use of a privilege under the control of government".

Fees generally include both license fees and user fees.¹ The purpose of the food worker permit fee is to protect the public health by ensuring that food workers are not diseased and that all food workers in the state have a minimum level of training and education in prevention of food-borne illness and safe food handling practices. This is an exercise of the government's regulatory authority. It is reasonable to conclude that the food worker permit charge is a "fee".

2. The food worker permit is imposed by a state agency, the State Board of Health; local government does not impose the fee.

Fees imposed by local government are not subject to the budget-setting limitations in RCW 43.135.055. If local government imposes the food worker fees, then they not subject to the limits

¹ Another question that sometimes comes up in Initiative 601's application is whether a particular charge is a "tax" or a "fee". In such cases, it is the operation and effect of the charge, and not the label that controls. Whether a governmental levy is considered a "fee" or a "tax" depends on whether the charge bears a reasonable relationship to the costs borne by government in providing services or regulatory activity (fee) or whether it raises revenue for general purposes (tax). See *Margola Assoc. V. Seattle*, 121 Wash.2d 625, 638-40 (1993). Not all charges imposed or revenues collected are either a "tax" or a "fee". Courts have drawn distinctions between the state acting in a governmental capacity and the state acting in a "proprietary capacity". When the state acts in a "proprietary capacity", it engages in a business-like venture or a party to a contract. The often-cited example is a cafeteria in a state facility open to the public. Its charges for sandwiches would probably not be considered either a tax or a fee. Additionally, it is unlikely that a fine or a penalty would be considered a "tax" or "fee".

in the statute. It is not entirely clear whether the fee is "imposed" by the state or by local government. The food worker permit fee has both "state" and "local" characteristics.

The "state" character of the food worker permit fee is apparent in RCW 69.06. The legislature designates the State Board of Health as the entity authorized to adopt minimum training requirements (RCW 69.06.010) and to set a single statewide fee (RCW 69.06.020). RCW 69.06.010 provides:

It shall be unlawful for any person to be employed in the handling of unwrapped or unpackaged food unless he or she shall furnish and place on file with the person in charge of such establishment, a food and beverage service worker's permit, as prescribed by the state board of health.... Rules establishing minimum training requirements must be adopted by the state board of health and developed by the department of health in conjunction with local health jurisdictions and representatives of the food service industry.

RCW 69.06.020 provides:

The permit provided in RCW 69.06.010 or 69.06.070 shall be valid in every city, town, and county in the state, for the period for which it is issued, and no other health certificate shall be required of such employees by any municipal corporation or political subdivision of the state. The cost of the permit shall be uniform throughout the state and shall be in that amount set by the state board of health. The cost of the permit shall reflect actual costs of food worker training and education, administration of the program and testing of applicants. The state board of health shall periodically review the costs associated with the permit and adjust the fee accordingly. The board shall also ensure that the fee is not set at an amount that would prohibit low-income persons from obtaining permits.

The Board has exercised its authority by promulgating administrative rules. The rules set minimum standards for food workers and direct local health officers to train and test permit applicants. Under the rule, the food worker permit fee is set at eight dollars. The local jurisdiction is authorized by the rule to use the fee to defray the costs of training, testing, and administering the program.²

² WAC 246-217-005 Purpose and authority. The purpose of chapter 246-217 WAC is to establish state board of health standards for the issuance of food worker cards (food worker permits) under Chapter 69.06 RCW and RCW 43.20.050. To promote and protect the health, safety and well-being of the public and prevent the spread of disease by food, all food service workers in the state shall demonstrate through the process of examination that they possess an adequate knowledge of the principles and practices involved in the safe preparation, storage, and service of foods.

WAC 246-217-025 Issuance of food worker cards -- Fees. (1) In order to qualify for issuance of an initial or renewal food

worker card, an applicant must demonstrate his/her knowledge of safe food handling practices by satisfactorily completing an examination conducted by the local health officer or designee.

(2) Each applicant for a food worker card must pay a fee in the amount of eight dollars. The fee shall be used by the jurisdictional health department or designee to defray the costs of food worker training and education, administration of the program, and testing of applicants. Photographic identification may be required at the time of application.

(3) The local health officer or designee shall furnish to the applicant a copy of the latest edition of the "Food and Beverage Service Workers' Manual" or similar publication, as prepared or approved by the department.

(4) Effective January 1, 2000, prior to conducting the examination of the applicant(s), the health officer (or designee) shall provide at least thirty minutes of instruction, including both audio and visual presentations. Instruction content shall include topics related to safe food preparation, storage and service. At a minimum, topics shall include: Food borne illness overview; basic bacteriology as it relates to food borne illness; proper cooking, hot holding, cold holding and cooling of potentially hazardous foods; cross-contamination prevention; and proper hand washing techniques.

(5) The food worker card examination will be uniform state-wide and will be prepared by and/or approved by the department; except that jurisdictional health departments may include additional questions to address local health concerns. The examination will cover topics identified in subsection (4) of this section, as required instruction topics. An exam must be approved by the department prior to its use. To pass the examination the applicant must answer at least eighty percent of the questions correctly.

(6) Upon payment of the required fee and the applicant's satisfactory completion of the examination, the applicant will receive the food worker card.

(7) A copy of the card or the applicable information shall be kept on file at the jurisdictional health department.

(8) Copies of food worker cards for all employed food service workers shall be kept on file by the employer or kept by the employee on his or her person and open for inspection at all times by authorized public health officials.

(9) All food worker cards shall be issued and signed by the local health officer. The local health officer may contract with persons to provide the required training or testing within his/her jurisdiction. The contracts shall include test security provisions so that test questions, scoring keys, and other examination data are exempt from public disclosure to the same extent as records maintained by state or local government agencies.

The "local" character of the fee is also evident. The permit fees are not paid to the state, but are paid to, collected by, and retained at the local health jurisdiction to defray the local jurisdiction's costs.

RCW 69.06.020 also requires that the fee set by the state board of health should reflect the actual costs of training, testing, and administering the program. Under the administrative rules, these costs are borne exclusively by local health jurisdictions.

The limitation on fees in RCW 43.135.055 is part of a broader scheme that limits state expenditures and tax increases. The focus of the law was to restrain state agency action and not local government action. The voters' pamphlet for Initiative 601 stated: "*Fees paid to the state* could not be increased beyond the fiscal growth factor without prior Legislature approval. (Emphasis added)

RCW 43.135.010 (Findings and Intent) states that part of the intent underlying the enactment of Initiative 601 was to ...4(b)...Assure that local governments are provided funds adequate to render those services deemed essential by their citizens;..." Thus, if the limits on fee increases in RCW 43.135.055 are applied to food worker permit fees, the end result seems contrary to Initiative 601's intent.

Nevertheless, the legislature has not left the minimum standards for food worker permits to each local jurisdiction to decide.³ Instead, RCW 69.06 recognizes the need for statewide uniformity in the fee and in the minimum standards food workers must demonstrate. RCW 43.135.055, if applicable, would prevent the state board from considering a fee increase in excess of the fiscal growth factor even if such a higher level of fee increase is necessary to meet the costs incurred by some local health jurisdictions.

On balance, I conclude that the state board of health is the entity "imposing" the fee charged for food worker permits. The process defined in RCW 69.06 is not just a "pass through" to individual local government entities. The discretion to set the fee is granted to the board, not to local health jurisdictions. The fee is uniform across the state and does not require that the fee meet all costs incurred by local government. Thus, the fee does not correspond directly to the cost incurred by each local jurisdiction. When setting the food worker permit fee, the board of health is directed to exercise discretion to consider the ability of the permit applicants to pay the fee, in addition to reflecting the costs of the program.

(10) The health officer or designee shall make test accommodations in accordance with the Americans with Disabilities Act for those requesting such accommodations.

[Statutory Authority: RCW 43.20.050. 99-13-019, § 246-217-025, filed 6/7/99, effective 7/8/99.]

³ Webster's II New Riverside University Dictionary defines "impose" as "To enact or apply as compulsory; levy."

The fee is collected and used at the local level, but it is the state board of health's administrative regulations that authorizes the local jurisdiction to do so. The local jurisdictions are expressly precluded from imposing independent charges on food workers by RCW 69.06.020.⁴ The state board of health determines the fee the local health jurisdiction may charge and authorizes local jurisdictions to retain the fees.⁵

3). The legislature has not subsequently approved a fee increase in excess of the fiscal growth factor.

State-imposed fee increases may not exceed the fiscal growth factor without legislative approval. One could argue that RCW 69.06 provides the Board with the necessary legislative approval to increase the permit fee in excess of the fiscal growth factor because RCW 69.06 directs that the permit fee "reflect" actual costs incurred by local jurisdictions.

It is unclear whether RCW 69.06 is such an authorization. There is no evidence that the legislature intended such an authorization when it enacted RCW 69.06. At best, it is ambiguous and therefore, would be subject to judicial interpretation. Currently, cases interpreting RCW 43.135 offer no clear guidance either way.

Still, on a more likely than not basis, I conclude that the legislature has not removed food worker fees from the limits imposed by RCW 43.135.055 in its enactment of RCW 69.06. I reach this result for two reasons.

First, the legislature has left the state board of health with a significant amount of discretion in setting the fees. Local jurisdiction costs are not the sole criteria the Board must consider when setting the fee. The needs of low-income permit applicants must be taken into account. There is also a relationship between the uniform standards for workers and the costs each jurisdiction bears in ensuring the standards are met. Costs might be less if standards are reduced, but the minimum standards are statewide standards and the Board establishes those minimum standards.

Second, the legislature does not require the board to set the fee at a level that necessarily satisfies every local jurisdiction's costs. It is hard to know precisely what the legislature intended by its use of the imprecise term "reflect" [actual costs]. The fees are not permitted to vary from local jurisdiction to local jurisdiction, as would be expected had the intent been for permit fees to equal actual costs. Actual costs almost certainly will vary from local jurisdiction to local jurisdiction.

A stronger argument could be made that RCW 69.06 authorizes the Board to exceed the fiscal growth factor if the board's discretion was more narrowly limited to require reimbursement of local costs. Alternatively, the statute could have established a mechanism, such as a formula, that would leave the board with little or no discretion to set fees.

⁵ Under RCW 69.06, other reimbursement methods could be developed administratively by the Board. For example, the board could set a uniform fee to be forwarded to the state, which the state could then distribute to local jurisdictions on a jurisdiction-by-jurisdiction basis depending on each local jurisdiction's costs.

September 6, 2001
Page 7

The simplest way to avoid uncertainty would be for the legislature to grant explicit approval for the Board to exceed the fiscal growth factor or for the legislature to simply set the fee by statute at an amount certain.

I hope you have found this memo helpful. Please let me know if you have questions or need additional information. This memo represents the author's opinion acting as a legal advisor to the state board of health. It should not be considered a formal Opinion of the Attorney General (AGO).